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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO CONTRERAS
LOPEZ,

Defendant and Appellant.

B289577

(Los Angeles County
Super. Ct. Nos. LA084142
and LA084433-02)

APPEAL from an order of the Superior Court of Los Angeles County, Eric P. Harmon, Judge. Remanded with directions.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Armando Contreras Lopez appeals the trial court's order terminating probation and ordering execution of his suspended

eight-year county jail term for one count of driving or taking a vehicle without consent after a prior conviction and one count of receiving a stolen motor vehicle after a prior conviction. On appeal Lopez contends the court erred in relying on a probation report without formally admitting the report into evidence. Lopez also argues the court erred by imposing fines and fees without considering his ability to pay. We affirm the revocation of probation and imposition of the suspended sentence and remand for the trial court to give Lopez the opportunity to request a hearing to present evidence demonstrating his inability to pay the applicable fines, fees and assessments.

FACTUAL AND PROCEDURAL BACKGROUND

1. Lopez's Pleas and Sentence

On August 24, 2016 Lopez was charged in a felony complaint in Los Angeles Superior Court Case No. LA084142 with driving or taking a vehicle without consent after a prior conviction for the same offense. (Veh. Code, § 10851; Pen. Code, § 666.5.)¹ The complaint specially alleged Lopez had served five prior separate prison or jail terms for felonies within the meaning of section 667.5, subdivision (b).

On October 5, 2016 Lopez was charged in a felony complaint in Case No. LA084433 with receiving a stolen motor vehicle after a prior conviction for violating Vehicle Code section 10851, subdivision (a). (§§ 496d, subd. (a), 666.5.) The complaint specially alleged Lopez had served four prior separate prison or jail terms for felonies within the meaning of section 667.5, subdivision (b).

¹ Statutory references are to the Penal Code unless otherwise stated.

Pursuant to a negotiated agreement, on November 28, 2016 Lopez pleaded no contest to the charges in both cases and admitted three of the prior prison or jail terms specially alleged in case no. LA084142 and one of the prior prison or jail terms specially alleged in case no. LA084433.

On December 12, 2016 the trial court sentenced Lopez to an aggregate term of eight years in county jail: the upper term of four years for driving or taking a vehicle without consent after a prior conviction and one year (one-third the middle term) for receiving a stolen motor vehicle after a prior conviction, plus one year for each of the prior prison or jail terms admitted in case no. LA084142. The court suspended execution of the sentence and placed Lopez on formal probation for a period of five years.

Among the conditions of probation imposed by the court, Lopez was ordered to complete a one-year residential drug treatment program and to obey all laws and orders of the court and all rules and regulations of the probation department. Lopez was conditionally released to a representative of the drug treatment program.

2. The Revocations and Reinstatements of Lopez's Probation

On July 10, 2017 Lopez appeared in court and admitted to being terminated from his residential treatment program and thus violating a condition of his probation. The court reinstated probation on the same terms and ordered Lopez to continue residential treatment at a different facility.

On August 1, 2017 Lopez's probation was preliminarily revoked based on a recent arrest.² At an August 31, 2017 probation revocation hearing Lopez admitted violating the conditions of his probation. The court revoked and reinstated probation on the same terms, but with the additional conditions in case no. LA084433 only that Lopez serve 32 days in county jail and complete 52 domestic violence counseling classes. In both cases Lopez was ordered to complete 180 days in a residential drug treatment program.

3. The Revocation of Probation and Execution of Sentence

On January 2, 2018 the trial court held a progress report hearing in case no. LA084433. The court read and considered a letter from the drug treatment facility stating Lopez had been terminated from the residential program.³ The court ordered Lopez to enroll at a new treatment facility by January 5, 2018 or to appear in court on that date if not yet enrolled. Lopez did not enroll in a new program by January 5 and failed to appear in court as ordered. The court preliminarily revoked Lopez's probation and issued a bench warrant for his arrest but held the execution of the warrant until January 11, 2018 due to potential confusion regarding the timing of the ordered appearance. Lopez again failed to appear on January 11, 2018, and the court ordered

² The record on appeal does not contain any information regarding the offense(s) for which Lopez was arrested.

³ The record on appeal does not contain the reporter's transcript from the January 2, 2018 hearing or the letter from the treatment center. While it is unclear when or for what reason Lopez was terminated from the residential program, the court's statements during the probation revocation hearing indicate Lopez left the program without authorization.

execution of the bench warrant. On March 20, 2018 Lopez was arrested following a domestic violence incident and taken into custody.

A probation violation hearing was held on April 17, 2018. Lopez's wife and the arresting police officer testified regarding the March 20 domestic violence incident, after which the trial court found Lopez was not in violation of probation based on his arrest. The court then turned to the other alleged probation violations described in the probation report prepared for the hearing: Lopez had failed to appear at the January 5 and January 11, 2018 hearings, failed to re-enroll in a residential drug treatment program and failed to enroll in a domestic violence treatment program. During a colloquy with the court, Lopez explained he had left the drug treatment program to care for his son and admitted he had not completed the domestic violence treatment program.

At the hearing the court repeatedly referred to the probation report. While it was not formally marked as an exhibit and admitted into evidence, the court informed the parties multiple times that it had read and considered the report. The court also stated it would give Lopez an opportunity to present any evidence in his defense, including "disputing anything in the probation report." Lopez did not present any evidence, but his counsel stated Lopez regretted leaving the drug treatment program and was willing to re-enroll. The court responded, "That's not really competent evidence that I can consider. . . . Even if it were, it wouldn't eliminate [Lopez's] responsibility to appear in court; it wouldn't eliminate his responsibility to get enrolled and complete the [domestic violence counseling] and the drug program. So I'm not hearing any evidence to suggest to the

contrary, so I would find that he’s in violation of probation in both matters, probation revoked on those bases.” The court ordered execution of Lopez’s previously suspended eight-year county jail sentence. The court also imposed the previously suspended fines, fees and assessments: a \$40 court operations assessment (§ 1465.8); a \$30 court facilities assessment (Gov. Code, § 70373); a \$10 crime prevention fine plus penalty assessment (§ 1202.5); a \$300 restitution fine (the statutory minimum) (§ 1202.4, subd. (b)); and a \$300 probation revocation fine (§ 1202.44).⁴

Lopez filed timely notices of appeal in both cases. We consolidated the two appeals.

DISCUSSION

1. *Governing Law and Standard of Review*

The court may “revoke and terminate” probation “if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation . . . officer or otherwise that the person has violated any of the conditions of” probation. (§ 1203.2, subd. (a); see *People v. Leiva* (2013) 56 Cal.4th 498, 504-505 [same]; see also § 1203.2, subd. (b)(1) “[a]fter the receipt of a written report from the probation or parole officer, the court shall read and consider the report . . . and may modify, revoke, or terminate the supervision of the supervised person . . . if the interests of justice so require”]; *People v. Urke* (2011) 197 Cal.App.4th 766, 773, 772 [“[p]robation is not a matter of right but an act of clemency”; “[w]hen the evidence shows that a defendant has not complied with the terms of probation, the order of probation may be revoked at any time

⁴ Each fine, fee and assessment was imposed in each case.

during the probationary period”].) “In the context of section 1203.2,” “[a]n admonition to a court to act in accordance with ‘the interests of justice’” serves merely “to invoke the sound discretion of the trial court.” (*People v. Angus* (1980) 114 Cal.App.3d 973, 986.)

If the trial court revokes and terminates probation in a case where judgment was pronounced and its execution suspended, “the court may revoke the suspension and order that the judgment shall be in full force and effect.” (§ 1203.2, subd. (c).) We review a trial court’s decision to revoke and terminate probation for abuse of discretion. (See *People v. Rodriguez* (1990) 51 Cal.3d 437, 443 [trial courts have “very broad discretion in determining whether a probationer violated probation”]; *People v. Michael W.* (1995) 32 Cal.App.4th 1111, 1119.)

“The minimum due process requirements at a formal probation revocation hearing include written notice of the claimed violations, disclosure of evidence against the defendant, an opportunity for the defendant to be heard and to present evidence, and ‘the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).’ [Citations.] The defendant’s right of confrontation at the formal revocation hearing does not arise from the confrontation clause, but from due process [citation]; it is ‘not absolute. . . .’ [Citation.] . . . Due process does not prohibit the ‘use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.’” (*People v. Gomez* (2010) 181 Cal.App.4th 1028, 1033-1034; accord, *People v. Abrams* (2007) 158 Cal.App.4th 396, 400 [“probation violation hearings . . . are not governed by the procedural safeguards of a criminal

trial”]; cf. *People v. Minor* (2010) 189 Cal.App.4th 1, 20 [“strict adherence to rules of evidence, and cross-examination, is not compelled in a probation extension proceeding”].)

2. *Lopez Has Forfeited His Contention the Court Erred in Relying on the Probation Report*

Lopez contends the court erred in relying on the probation report despite its not being admitted into evidence. He argues, “Appellant could not be expected [to] challenge a document not properly admitted into evidence and authenticated by the prosecution. He had no opportunity to rebut the prosecution’s case because the prosecution never made its case.”

Lopez failed to raise any objection to the court’s reliance on the report during the probation revocation hearing, and thus he has forfeited any claim of error. (*People v. Clark* (2016) 63 Cal.4th 522, 603 [failure to make timely and specific objection forfeits claim of evidentiary error on appeal]; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 [failure to object on ground asserted on appeal results in forfeiture]; *People v. Stowell* (2003) 31 Cal.4th 1107, 1114 [“an appellate court will not consider claims of error that could have been—but were not—raised in the trial court”]; cf. *People v. Thomas* (1967) 65 Cal.2d 698, 708 [when witness arguably not properly sworn, “if defendant was unsatisfied with the adequacy of the oath-taking, he should have called the matter to the attention of the court. Any shortcomings in the procedure were waived . . . by failure to object”]; *People v. Carreon* (1984) 151 Cal.App.3d 559, 579 [“if a witness is permitted to testify without having taken the appropriate oath, the defect must be timely noted and failure to do so constitutes a waiver”]; *People v. Haeberlin* (1969) 272 Cal.App.2d 711, 716 [“objection [to oath-taking procedures] must be raised in the

proceeding where the witness is testifying and at a time when the defect can be easily remedied”].)

Lopez’s argument he could not have objected to the report because it was not admitted into evidence is without merit. The court referred repeatedly to the report during the hearing and, on at least three occasions, stated it was relying on the information in the report. The court also expressly gave Lopez an opportunity to present evidence rebutting the report, which he failed to do.

Finally, even if the court erred in relying on the probation report, any error was harmless beyond a reasonable doubt. (See *People v. Arreola* (1994) 7 Cal.4th 1144, 1161 [evidentiary issues at probation revocation hearing assessed under federal beyond-a-reasonable-doubt harmless error standard].) Lopez admitted to the court he had left the residential drug treatment program early and had failed to enroll in a domestic violence treatment program. In addition, the court did not need to rely on the probation report to know Lopez had failed to appear for a hearing in January 2018 because that failure to appear was documented in the court’s minute orders and bench warrant. Accordingly the court could have based its finding of a probation violation on the court records alone.

3. *Lopez Has Failed To Show the Court’s Finding of a Probation Violation Was Not Supported by Substantial Evidence*

In support of his argument the court’s finding of a probation violation was not supported by substantial evidence, Lopez argues only that the court could not properly rely on the probation report. In light of our conclusion the report was properly considered, and, in any event, the finding was fully

supported by the court's records regarding Lopez's failure to appear as ordered, Lopez's argument fails.

4. *Remand Is Necessary To Afford Lopez the Opportunity To Request a Hearing Concerning His Ability To Pay Fines, Fees and Assessments*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by section 1465.8 or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without first determining the convicted defendant's ability to pay. (*Dueñas*, at p. 1168.) A restitution fine under section 1202.4, subdivision (b), in contrast, is intended to be, and is recognized as, additional punishment for a crime. Section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a compelling and extraordinary reason not to impose the restitution fine; inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. To avoid the serious constitutional question raised by these provisions, we held, although the trial court is required to impose a restitution fine, the court must stay execution of the fine until it is determined the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.)

In supplemental briefing filed with the permission of this court, Lopez contends under *Dueñas* the assessments and fees imposed by the trial court should be reversed and the execution of the restitution fine stayed. The People argue Lopez forfeited this issue on appeal because he failed to raise it in the trial court. However, as we recently explained when rejecting the same argument in *People v. Castellano* (2019) 33 Cal.App.5th 485

(*Castellano*), at the time the defendant was sentenced, “*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court’s consideration of a defendant’s ability to pay. . . . When, as here, the defendant’s challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*Castellano*, at p. 489; accord, *People v. Johnson* (2019) 35 Cal.App.5th 134, 138; see also *O’Connor v. Ohio* (1966) 385 U.S. 92, 93 [87 S.Ct. 252, 17 L.Ed.2d 189]; *People v. Doherty* (1967) 67 Cal.2d 9, 13-14; see generally *People v. Brooks* (2017) 3 Cal.5th 1, 92 [“[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence”]; but see *People v. Frandsen* (2019) 33 Cal.App.5th 1126.) We similarly decline to apply the forfeiture doctrine to Lopez’s constitutional challenge.

Relying on *Dueñas*, Lopez asserts the court facilities and operations assessments and the crime prevention fines should be reversed, and execution of the restitution fines stayed, unless and until the People prove he has the present ability to pay the fine. As we explained in *Castellano*, “*Dueñas* does not support that conclusion in the absence of evidence in the record of a defendant’s inability to pay. . . . [¶] . . . [A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the

amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections.” (*Castellano, supra*, 33 Cal.App.5th at p. 490]; accord, *Dueñas, supra*, 30 Cal.App.5th at pp. 1168-1169.) If the trial court determines, after considering the relevant factors, a defendant is unable to pay, then the fees and assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant’s ability to pay has been restored. (*Dueñas*, at pp. 1168-1169, 1172; *Castellano*, at p. 490.)

As Lopez’s sentence is not yet final, we remand the matter to the trial court so that he may request a hearing and present evidence demonstrating his inability to pay the fines, fees and assessments imposed by the trial court.

DISPOSITION

The order revoking probation and imposing the suspended sentence is affirmed, and the matter is remanded to give Lopez the opportunity to request a hearing on his ability to pay the fines, fees and assessments imposed by the trial court. If he demonstrates the inability to pay, the trial court must strike the court facilities assessments (Gov. Code, § 70373) and the court operations assessments (§ 1465.8); and it must stay the execution of the restitution fine.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.